Supreme Court, U.S.
FILED
JAN 11 2016
OFFICE OF THE CLERK

Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, and 15-191

IN THE

Supreme Court of the United States

DAVID A. ZUBIK, ET AL., *Petitioners,*

v.

SYLVIA BURWELL, ET AL., *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD CIRCUIT, FIFTH, TENTH, AND D.C. CIRCUITS

BRIEF OF THIRTEEN LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

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SUMMARY OF ARGUMENT

Suppose a federal law permitted government officials to enter a Catholic church and use church property to distribute abortifacients and contraceptives over the Church's objection. A law that authorized such commandeering of church property would burden the church's religious exercise, even if government paid for the drugs and compensated the church for the use of its resources. By commandeering church property, such a law would force the church to be complicit in activity to which it has serious religious objections.

That is what the government has done in this case. The Little Sisters of the Poor, an order of Catholic nuns, object to participating in the distribution of abortifacients and contraceptives to their employees.[2] Although the government insists that revised regulations of the Department of Health and Human Services (HHS) relieve the nuns of the obligation to pay for these drugs, HHS still commandeers health care plans created and controlled by the nuns and uses them to distribute abortifacients and contraceptives. State and federal law treat these health care plans as the property of the Little Sisters of the Poor. Thus, the Little Sisters make the unremarkable claim that HHS substantially burdens their religious exercise when it

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[2] Petitioners include other religious organizations and their health care plans who are similarly situated to the Little Sisters of the Poor. For convenience and clarity, however, this brief refers only to the Little Sisters of the Poor.

uses their property in ways that offend their faith's teachings.

The courts below in this and similar cases, however, have fundamentally misunderstood the nature of the burden created by the HHS regulations. No one claims that the nuns are forced to directly purchase abortifacients, nor is their religion burdened merely because they have to complete additional forms. These arguments miss the basic issue in this case. Nonetheless, courts have erroneously focused on the fact that the Little Sisters of the Poor are not financially liable for the drugs and that the HHS paperwork requirements created are minimal.

HHS burdens the Little Sisters' religious exercise by commandeering the nuns' property. HHS threatens the nuns with millions of dollars in fines if they refuse to cooperate in government efforts to use their own plans in ways that they find religiously abhorrent.

ARGUMENT

By commandeering the health care plan created, controlled, and owned by Petitioners, the Department's regulations force them to participate in distributing religiously objectionable abortifacients and contraceptives.

I. The Department's regulations burden Petitioners' religion by commandeering their property and using it to distribute abortifacients and contraceptives.

The burden imposed by HHS regulations can best be understood though analogy. Suppose a law permitted government officials to require the nuns of the Little Sisters of the Poor to distribute abortifacients and contraceptives personally to their employees. The government would pay for the drugs and compensate the nuns for their time and expenses, so there would be no financial complicity in the distribution of the pharmaceuticals. Further, the nuns would be free to voice their religious objections while distributing the abortifacients and contraceptives. The government would even take steps to insure that anyone receiving the drugs from the nuns understood their religious objections. That law would impose no financial burden on the nuns, and handing out the abortifacients could be done easily, requiring less effort than other regulatory requirements with which Petitioners must comply. Yet that law would place a substantial burden on the nuns' religious exercise.

Now imagine that the law, rather than requiring that the nuns personally distribute the abortifacients, allowed a government official to enter the nuns' facilities and use their medicine carts and other equipment to distribute the objectionable drugs. Again, the law would fully compensate the Little Sisters of the Poor for their financial costs. The nuns would be free to follow the medicine carts through their facility denouncing abortion and contraception, and the government would take steps to make clear

that the Little Sisters of the Poor object to the provision of the drugs using the nuns' property. That law would also represent far more than a "*de minimis*" burden on the nuns' religion. Rather, it would directly burden the nuns' religious exercise in the same way as the first hypothetical law. It would make them unwilling participants in the distribution of drugs to which they sincerely and seriously object. That this hypothetical law commandeers the nuns' property rather than their persons does not change the fact that they would be forced to be complicit in what they sincerely regard as sinful behavior.

The HHS regulations are analogous to this second hypothetical law. The Little Sisters of the Poor have created a health care plan that they control and that is their property. The government seeks to hijack the nuns' plan in order to distribute abortifacients and contraception. The Little Sisters have no financial liability for the purchase of the drugs, but that is not their claim. They object to the use of their property.

A. State and federal law treat employer-provided health care plans as property of the employers, created and controlled by them.

Health insurance plans do not spring into existence *ex nihilo*, nor are they creations of the government. *Cf. Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) ("Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan."). Rather, employers design insurance plans to

provide employees with benefits as part of their compensation. The health care plan of the Little Sisters of the Poor exists only because the Little Sisters of the Poor created it.

As a matter of state law, employer-provided health insurance is a contract between the employer and the insurance provider to which the employee is generally treated as a third-party beneficiary. *See, e.g., Sw. Health Plan, Inc. v. Sparkman*, 921 S.W.2d 355 (Tex. App. 1996) (holding that employee was third-party beneficiary of contract between employer and its health insurance company); *but see Cahill v. Eastern Benefit Systems, Inc.*, 603 N.E.2d 788, 792 (Ill. App. Ct. 1992) (holding that employee could not sue as third-party beneficiary of contract between employer and insurance company providing benefits to employer's employees).

In the case of employer self-insurance, the relationship between the employer and the third party administrator (TPA) is also contractual. *See, e.g., Multi-Craft Contractors Inc., v. Perico Ltd.*, 239 S.W.3d 33 (Ark. Ct. App. 2006) (deciding dispute between self-insured employer and its third-party administrator as matter of contract law). Once contracts are executed, they are a form of personal property. *See, e.g.,* RESTATEMENT (SECOND) OF CONTRACTS Ch. 15, Introductory Note (1981) (noting that law of assignment in contract "is part of the larger subject of transfer of intangible personal property.").

Petitioners do not challenge the authority of the government to regulate employer-provided health

insurance in general.[3] Insurance contracts are a heavily regulated form of property and "[h]ealth insurance is one of the most heavily regulated industries in the United States." *See* Timothy S. Jost & Mark A. Hall, *The Role of State Regulation in Consumer Driven Health Care*, 31 AM. J. L. & MED. 395, 401 (2005). Rather, the Little Sisters challenge the lawfulness of the means by which HHS has chosen to exercise that power in this case. Property subject generally to governmental regulation does not thereby lose its status as the owner's property.

In other contexts, federal law treats employer-provided health care plans as employer property. For example, health care plans may be assumed in bankruptcy and are treated as property of the employer's bankruptcy estate. *See* 11 U.S.C. §365 (2012) (delineating a trustee in bankruptcy's power to assume and assign executory contracts). Although the Employee Retirement Income Security Act (ERISA), the main federal statute governing employer-provided insurance, does not govern Petitioners' health care plan, this Court's ERISA cases illustrate that health care plans are the creatures of their creators, namely employers. This Court has noted that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v.*

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[3] There are, however, complex questions in this case over the precise nature and scope of the government's power to regulate Petitioners' health care plans under ERISA and the ACA. *See* Pet. Cert. No. 15-105, at 11-13.

Schoonejongen, 514 U.S. 73, 78 (1995). This is true even though ERISA imposes on plan administrators fiduciary duties to plan beneficiaries.[4] However, "ERISA's fiduciary duty requirement simply is not implicated where [an employer], acting as the Plan's settlor, makes a decision regarding the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999). Likewise, this Court has said "decisions regarding the form or structure of a plan are generally settlor [i.e. employer] functions." *Beck v. PACE Int'l Union*, 551 U.S. 96, 101-02 (2007) (citation and marks omitted). In short, federal law treats employer-provided health care plans as the creation and creature of the employer.

B. The regulations commandeer Petitioners' health care plans to distribute abortifacients and contraceptives.

There are many ways in which HHS could ensure that Petitioners' employees have access to contraception without cost sharing. However, as the D.C. Circuit explained, what the Department's regulations seek to do here is make obtaining contraception "seamless from the beneficiaries'

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[4] In ERISA argot, "plan administrators" and "third party administrators" are not the same thing. "Plan administrators" are generally the employers who set up the plans. "Third party administrators," in contrast, are mere agents hired by the plan administrators to process claims and perform other clerical functions on behalf of employers.

perspective." *Priests for Life v. U.S. Dept. of Health & Human Serv's*, 772 F.3d 229, 245 (D.C. Cir. 2014). This "seamlessness," however, is achieved only because the government uses the religious objectors' plans to distribute contraceptives. Under the regulations, the TPA, an agent hired by the Little Sisters and terminable by them, would process employee claims to abortifacients and ensure that the Petitioner's plan distributes the religiously offensive drugs. *See* 26 C.F.R. §54.9815-2713A(b)(2) (2015). The only reason the TPA has a relationship with Petitioner's employees, or access to the information necessary to provide them with abortifacients, is because the TPA administers the Little Sisters of the Poor's health care plan. Thus, it is untrue that "the acts that violate their faith are the acts of third parties." *See East Texas Baptist University v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015). In this context, the TPA is not some remote stranger, a third-party unconnected with petitioners. Rather, the TPA is the nuns' agent, administering the nuns' plan.

Some lower courts have suggested that the government is not in fact taking over or using the health care plans of religious objectors. Writing for the Seventh Circuit, for example, Judge Posner erroneously claimed, "[a]ctually there are no efforts by the government to take over [objectors] health plans." *Wheaton College v. Burwell*, 791 F.3d 792, 794 (7th Cir. 2015). He went on to insist that objectors are "mistaken when [they] tell us that the government is 'interfering' with [their] contracts with [their] insurers." *Id.* at 796. This claim, however,

was mistaken, as the government has acknowledged. In explaining its policy, the government stated that:

> The Departments believe that the third party administrators and health insurance issuers already paying for other medical and pharmacy services on behalf of the women seeking the contraceptive services are better placed to provide seamless coverage of the contraceptive services, than are other providers that may not be in the insurance coverage network, and that [illegible]k *the coverage administration infrastructure to verify the identity of women in accommodated health plans and provide formatted claims data for government reimbursement.*

80 Fed. Reg. 41328-41329 (July 14, 2015) (emphasis added). The "coverage administrative infrastructure" in this case, however, exists only because the Little Sisters of the Poor have created it. Without the plans that they have authored and the TPA they retained to handle day-to-day operation of the plan, HHS would have to find another method to "verify the identity" of claimants and access their data. As HHS admitted to this Court, "If the objecting employer has a self-insured plan, the contraceptive coverage provide by its TPA is, as an ERISA matter, part of the same ERISA plan as the coverage provided by the employer." Br. Resps. Opp'n at 19, Pet. Writ Cert., *East Texas Baptist University, et al. v. Burwell*, No.

15-35.[5]

Government attempts to "accommodate" the Petitioner's religious objections did nothing to eliminate these concerns. True, HHS claims to relieve the Little Sisters of the Poor of financial complicity. It is a non sequitur, however, to argue that because there is no financial burden, there is no burden of religious exercise. Indeed, this Court has struck down requirements that burden citizens' religious exercise even when those legal duties have conferred financial *benefits*. *See Thomas v. Review Board*, 450 U.S. 707 (1981) (holding that state government agency violated Free Exercise clause when it punished someone for refusing religiously objectionable but paid employment); *Sherbert v. Verner*, 374 U.S. 398 (1963) (same). Likewise, the employees would be notified in various ways that the Little Sisters of the Poor are not paying for contraceptives, *see* 26 C.F.R. §54.9815-2713A(d) (2015) ("The notice [from the TPA to employees] must specify that the eligible organization does not administer or fund contraceptive benefits"), but this notification does not change the fact that it is the nuns' plan that is being used to purvey contraceptives to which they object. It is the use of their property that constitutes a burden on Petitioners' religious exercise.

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[5] As noted earlier, ERISA does not govern the Little Sisters of the Poor's plan, but this does not change the fact that HHS is seeking to use their plan to distribute abortifacients and contraceptives to which they sincerely object on religious grounds.

II. The arguments made in the lower courts as to why HHS does not burden religious objectors are unpersuasive.

The Tenth Circuit misunderstood the burden HHS placed on the religious exercise of the Little Sisters of the Poor. Its analysis focused on two issues.

First, the Tenth Circuit asserted that the government would assume the financial costs of providing contraception. *See* No. 15-105, Pet. App. 48a. ("The accommodation relieves the Plaintiffs from complying with the Mandate and guarantees that they will not have to pay for contraceptive coverage.").

Second, the court asserted that filling out the paperwork required by HHS imposed only a *de minimis* administrative burden. *Id.* at 48a. Other lower courts faced with similar challenges to the HHS regulations have characterized the burdens imposed on religious objectors in similar terms. *See, e.g., Priests for Life*, 772 F.3d at 249 ("A review of the regulatory accommodation shows that the opt-out mechanism imposes a *de minimis* requirement on any eligible organization"). This approach, however, is misconceived.

A. It is irrelevant that Petitioners are not financially liable.

First, the government purchase of the abortifacient drugs at issue is irrelevant to the question of whether the Petitioners' religious exercise has been burdened. The Office of Management and Budget estimates that in 2015 the federal

government will spend $1.1 trillion on the health care of American citizens. Office of Management & Budget, *Table 15.1 – Total Outlays for Health Programs: 1962-2020*, available at: http://www.whitehouse.gov/omb/budget/Historicals/. These subsidies take the form of everything from financial support for basic medical research to paying directly for the medical procedures of millions of citizens. Through HHS regulations, the government has spent part of its health care budget on abortifacients and contraception, but those expenditures without more are irrelevant to the nuns' claims. The Little Sisters have not claimed their religious freedom is burdened when government behaves in ways that they find religiously objectionable. Religious freedom "simply cannot be understood to require that the Government conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986).

Contrary to the suggestion by lower court judges, *see* No. 15-105, Pet. App. 91a, challengers to the HHS regulations do not question this principle. The Little Sisters do not claim that HHS burdens their religious exercise merely because it pays for drugs to which they object. Nor do they claim that HHS burdens their religious exercise because their employees might use abortifacients, which the nuns believe to be sinful, at government expense. The nuns sue neither to keep the government from providing contraception to their employees, nor to limit, by force of law, their employees' ability to obtain or use abortifacients contraception at no expense. Rather, the Little Sisters sue to protect

their religious integrity against objectionable governmental commandeering of their property.

As long-time observers of this kind of litigation, we suspect that both the government and the lower courts feel exasperated that having been relieved of the obligation to *purchase* abortifacients and contraceptives, the Little Sisters of the Poor and other objectors continue to challenge the Department's regulations.[6] But such impatience is neither warranted nor a sound basis for legal analysis. The fact that the government has avoided violating RFRA by directly ordering the Little Sisters of the Poor to pay for contraceptives does not leave HHS free to violate RFRA by commandeering the nuns' health care plans. *See Burwell v. Hobby Lobby Stores Inc.*, 134 S.Ct. 2751, 2775 (2014) ("By requiring [religious objectors] to *arrange* for such

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[6] Writing for the Seventh Circuit, for example, Judge Posner disappointingly suggested that the plaintiff, a Christian liberal arts college, was lying when it claimed that it would have no RFRA objection to the Department's regulations if the College's health care plan was not used to distribute abortifacients. *See Wheaton College v. Burwell*, 791 F.3d 792, 798 (7th Cir. 2015) ("At oral argument Wheaton's lawyer said that his client has no objection to the government's using the college's insurers to provide emergency-contraceptive coverage as long as it's not 'using' Wheaton's contract with the insurers We wonder."). Elsewhere, in the opinion Judge Posner suggested that the plaintiff's real goal was to make it more difficult for students to obtain abortifacients. *See id.* at 797 ("But it seeks to make that access more difficult"). These asides were irrelevant to the legal questions Judge Posner was addressing, but reveal an unfortunate unwillingness to consider the nature of the religious burdens created by HHS regulations.

coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs" (emphasis added)).

B. It is irrelevant that the paper work required is *"de minimis"*

The Tenth Circuit and other lower courts have also emphasized that HHS regulations require only that objectors fill out a simple form. *See* Pet. App. 48a. They correctly observe that completing the forms would take at most a few minutes and is far less onerous than other regulations with which the Little Sisters must comply. *Compare Priests for Life*, 772 F.3d at 237 ("All Plaintiffs must do to opt out is to express what they believe and seek what they want via a letter or two-page form."). This argument, however, misunderstands the nature of the religious burden in this case. What is objectionable about the HHS regulations is not that they require religious employers to complete additional paperwork. The regulations burden the Little Sisters by commandeering their property in the service of the government's delivery of drugs to which they sincerely and religiously object.

CONCLUSION

The fundamental question in this case is whether, despite this Court's holding in *Hobby Lobby*, 134 S.Ct. 2751, the government continues to implement the ACA in a way that violates the Religious Freedom Restoration Act by forcing the Little Sisters of the Poor to assist in the distribution of abortifacients and contraceptives to which they have serious and sincere religious objections. The

answer to this question is less complex than it initially appears. The Little Sisters of the Poor have created a health care plan for their employees. It is their creation and their creature. It exists only because they created it. It is a creature of contract, a contract that they authored. It is ultimately their property. The government wants to use it because it finds it administratively convenient to do so. The Little Sisters object to having their property dragooned into these efforts. The government is free to pursue its policy of providing preventive health care services, but it may not require the Little Sisters of the Poor to participate in that effort "unless that action constitutes the least restrictive means of serving a compelling government interest." *Id.* at 2759.

Respectfully submitted,

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January 11, 2016